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No. 120

In the
Supreme Court of the United States
OCTOBER TERM, 1967

LLOYD EDWARDS, as Executor of the Will of Seren P. Hensen, Deceased,

Petitioner,

vs.

V. LEE PHILLIPS,

Respondent.

REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the Memorandum for the Respondent in Opposition to the Petition for Certiorari, attention is called to the decision in *Schoellkopf* v. *United States,* 124 F. 2d, 982 (C.A.2). Regrettably, this decision did not come to the attention of counsel for the Petitioner in their research and, as stated by the Respondent, it was not cited below by either party and thus the courts below were deprived of the benefit of Judge Hand's views. His views are in direct conflict with those of the courts below in this proceeding. In the *Schoellkopf* case one of the issues related to the deductibility of a contribution to a trust which, under certain circumstances, was to make substantial annual

payments to two German cities for charitable purposes. The statute involved was Section 23 (n) of the Revenue Act of 1928 (26 U.S.C.A., Int. Rev. Acts, page 358) which provided for income tax deductions as follows:

> "In the case of an individual, contributions or gifts made within the taxable year to or for the use of: (1) the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;
>
> (2) any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

The language involved was substantially identical to that in Section 2055 (a) of the Internal Revenue Code of 1954; the argument of the United States was identical to that made on behalf of the Respondent in the proceeding; and the argument made by counsel for the taxpayer and sustained by the Court was identical to the argument of counsel for the Petitioner in this proceeding. Judge Hand refused to read non-existent language into the statute and to apply the doctrine *inclusio unius est exclusio alterius* to the solution of the case, stating at page 985:

> "This the defendant challenges because § 23 (n) (1) exempts gifts made to municipalities within the United States, and by implication does not exempt any others. That would indeed preclude unrestricted gifts to foreign cities, and is a good answer as far as concerns § 23 (n) (1); but § 23 (n) (2) creates an exemption without local limitations when the purposes are charitable as there defined. The canon,

> expressio unius, does not therefore apply, and the gift is exempt unless we must import a general limitation into § 23 (n) (2) so that it shall include no charities except those for the benefit of persons within the United States. We do not understand that the defendant so argues, nor is there any warrant for it in the language of the statute; indeed, the contract between subdivisions one and two strongly suggests the opposite."

No doubt this decision reflected Judge Hand's views of the legal maxims as stated in the comment on the case at bar appearing in Roehner On Federal Taxation, Vol. 12, No. 6, March 24, 1967, p. 29, reading as follows:

> "The court's reliance on the Latin maxim recalls the statement by Lord Shaw: 'The day for canonizing Latin phrases has gone past.' *Ballard* v. *North British Rwy. Co.*, 1923 S.C. (H.L.) 43 at 56. On this point Lord Wright has said: '(T)hese general formulae are found in experience often to distract the Court's mind from the actual exigencies of the case, and to induce the Court to quote them as offering a ready made solution.' (*Lissenden* v. *C.A.V. Bosch, Ltd.* (1940) A.C. 412 at 435.) As Learned Hand felicitously put it in an oft-quoted phrase, they are anodynes for the pains of reasoning."

We repeat that the real party in interest in this proceeding is a political subdivision of the State of Denmark. As the record discloses (R. 55), counsel for the Petitioner were specially retained by the Danish Consul General at Chicago, Illinois, for the sole purpose of representation regarding the tax questions here involved. In addition, the record shows that the only witness at the trial was the Danish Vice Consul and that the documentary evidence as to the nature of the school district was furnished through the Danish Foreign Ministry. In short, both par-

ties to this proceeding are only nominal and it might be more appropriately entitled *Denmark* v. *United States* and considered for certiorari accordingly and in view of the fact that the decision below is in conflict with the decisions in the *Schoellkopf* case and the *Tait* case.

Respectfully submitted,

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